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No. 82-5466

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD G. WELSH,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF OF PETITIONER

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QUESTION PRESENTED

Can police, without a warrant and without consent, enter a suspect's home at night to arrest him for a nonjailable traffic offense committed outside the presence of the police?

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v.

STATE OF WISCONSIN,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF PETITIONER

OPINIONS BELOW

The decision of the Wisconsin Supreme Court in this case is reported as State v. Welsh, 108 Wis. 2d 319, 321 N.W.2d 245 (1982). It is reproduced in the Joint Appendix at p. 126. The decision of the Wisconsin Court of

Appeals in this case is unreported. It is reproduced in the Joint Appendix at p. 114.

JURISDICTION

The opinion of the Wisconsin Supreme Court of July 2, 1982, affirmed a Circuit Court order suspending Welsh's automobile operating privileges for an unreasonable failure to take a chemical test for intoxication. That order is stayed pending a decision by this Court.

The petition for a writ of certiorari was mailed on September 24, 1982 and docketed in this Court on September 27, 1982. The Petition was granted on February 22, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of applicable constitutional and statutory provisions form the Petitioners Appendix at the end of this brief (A:1-6).

The following constitutional and statutory provisions are cited:

United States Constitution:

Amendment IV

Amendment XIV

Ariz. Rev. Stat. Ann., Sec. 13-3914(c) (1982)

Calif. Pen. Code Sec. 1526(b)

Calif. Pen. Code Sec. 1528(b) (West Supp. 1981)

Fed. Rules Crim. Proc. 41(c)(2)

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Wis. Stat. (1975) 345.24

Wis. Stat. (1975) 346.63

Wis. Stat. (1975) 346.65

Wis. Stat. (1977) 885.235

Wis. Stat. (1977) 968.07

STATEMENT OF THE CASE

A. SUMMARY

Without establishing consent to enter, police arrested Edward Welsh without a warrant in his home in Madison, Wisconsin at 9:00 p.m. on Monday, April 24, 1978. He was charged with operating a motor vehicle while intoxicated in violation of § 346.63(1)(a) Wis. Stat. (A:2-3).[1] Welsh, who was naked

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[1]The first Complaint was dismissed on July 19, 1978, because the City of Madison was not the proper complainant. A second Summons and Com-

in his bed when police entered the family home, was there confronted by police who purposefully entered either to arrest him, or to investigate. (J.A. 46, 78, 101). He was taken to the Madison police station where he refused to take a breathalyzer test. This test is required by Wisconsin's Implied Consent Law (§343.305(2)(b) Wis. Stat., A:5).

Edward Welsh's arrest and his ensuing refusal to take a breathalyzer test

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plaint, charging a misdemeanor, was issued by the State of Wisconsin on August 15, 1978. On February 20, 1980, a hearing was held on motions to dismiss. Welsh appeared along with his wife and one of his stepdaughters (J.A. 12, R.13:6). The State appeared, had no witnesses, and requested an adjournment. The State's request for an adjournment was denied. The defendant then moved for dismissal which the Judge granted on February 22, 1980. The Judge dismissed the State's complaint without prejudice. On February 25, 1980, the State charged the defendant for the third time.

resulted in two linked proceedings: one criminal and the other civil.

First, he faced a criminal charge for the second offense of operating a motor vehicle while intoxicated. A second offense is a misdemeanor, § 346.65(2) Wis. Stat. 1975 (A-3). No evidence, however, shows that the Madison police knew of any prior conviction when they entered the Welsh home.

The second proceeding, leading to this Court, began with the hearing on Welsh's claim that his refusal to take the breathalyzer test was reasonable, and hence that his operating privileges should not be suspended. (J.A. 91).

B. THE HEARING ON THE MOTION TO SUPPRESS EVIDENCE IN THE CRIMINAL CHARGE OF OPERATING A MOTOR VEHICLE WHILE INTOXICATED

On July 14, 1980, a hearing was held on motions relating to the misdemeanor

charge of operating a motor vehicle while intoxicated. Defendant asserted lack of personal jurisdiction because of the warrantless in-house arrest (J.A. 13).[2]

The defendant claimed the state's delays in bringing him to trial denied him a fair hearing. In the interval his two teenaged stepdaughters who were vital witnesses to the issue of consent had left home and were unavailable to testify (J.A. 17). The Court ruled that the consent issue would be irrelevant if the State could show that the police had probable cause and that exigent circumstances or hot pursuit justified the warrantless arrest. (J.A. 20-22)

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[2]Under Laasch v. State 84 Wis. 2d 587, 267 N.W.2d 278 (1978), an invalid arrest deprives a court of personal jurisdiction. Contra, Ker v. Illinois, 119 U.S. 436 (1886).

Three witnesses testified on the facts leading to the entry and arrest: Randy Jablonic, Officer Richard Daley, and Patricia Welsh, the defendant's wife.

Jablonic testified that between 8:30 and 9:00 P.M. on April 24, 1978 when it was dark, raining and visibility was bad he saw the defendant's car operate erratically, veer off the road, and stop in a field or cemetery (J.A. 25-26 R.13:9). No damage or injury occurred.

According to Jablonic the defendant unsteadily approached Jablonic's truck and asked for a ride home which Jablonic refused to supply. (R.13:11) Jablonic did not smell the defendant's breath (R.13:11) but he testified that the defendant's speech was slurred and he seemed very concerned that Jablonic would call the police (R.13:11,12). After again asking for a ride, and again being refused, the defendant walked away

(J.A. 27).

The police, who had been called by a passing driver, arrived three to five minutes later (J.A. 23, 24, 26). Officer Daley testified that he was sent to the scene at 8:49 P.M. and talked with Jablonic for about five minutes.[3] (J.A. 29) A license plate check on the vehicle revealed registration to the defendant, who lived close by (J.A. 31). Daley recalled having arrested Welsh a week or two earlier at his home for an alcohol-related disturbance (J.A. 34).

It took Daley "a minute or a minute and a half at the most" to drive to the Welsh home (J.A. 34). Officer Daley and another policeman knocked at the door

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[3]From the record it is unclear exactly what Jablonic told Officer Daley upon which the police could determine probable cause. 108 Wis. 2d at 348, 321 N.W.2d at 260 J.A. 190. (Abrahamson, J., dissenting)

which was answered by one of the defendant's stepdaughters (J.A. 35). Daley testified that he intended to arrest Welsh, or at least further investigate (J.A. 85, 86). Daley said the stepdaughter opened the door and beckoned them toward the stairs (J.A. 37). He also testified that as they were going up the stairs, Mrs. Welsh came from the kitchen and gave her consent to their entry (J.A. 38, 39).

Daley testified that in the bedroom he saw the defendant lying naked in bed with muddy pants at the side of the bed. (J.A. 44) He ordered the defendant to get up and put his pants on because they wanted to speak to him. (J.A. 44) Daley said that the whole room smelled of alcohol and that the defendant' speech was slurred. (J.A. 44). Daley arrested the defendant, after he put on his trousers, for oper-

ating a motor vehicle while under the influence of intoxicants (J.A. 45, 98).

In court, Daley answered that he understood that when an arrest is made for operating under the influence the person should be brought downtown as soon as possible for a breathalyzer test. He said that the test must be taken within two hours of the observed violation. (J.A. 45-46)

Mrs. Welsh testified that she had been upstairs when the police arrived (J.A. 51); that she remembered "everything being really confused" when they entered; (J.A. 53) and that she did not give her consent for them to enter (J.A. 56).

The Judge made no findings on whether the entry was consensual. (J.A. 21-22, 80) He found that three policemen had arrived at the Welsh home within ten minutes of leaving the scene (J.A.

79, 102-103) and held that the warrantless arrest was valid because the police had probable cause to believe that the defendant had committed the offense of operating while under the influence and that reasonably hot pursuit and exigent circumstances justified entry. (J.A. 79-80) The petitioner's motion to dismiss the complaint was denied. (J.A. 79-81)

C. THE REASONABLENESS HEARING

On September 5, 1980, a hearing was held before the same judge to determine whether the Welsh's refusal to take the breathalyzer test was reasonable. (J.A. 91-113) The defendant again argued that the arrest was invalid and that therefore his refusal to take the test was

reasonable (J.A. 102-105).[4] (J.A. 92, 102)

The Judge held that the arrest was valid because his decision in the earlier July 14th hearing was binding. (J.A. 111). He concluded that Welsh's refusal to take the breathalyzer test was unreasonable and ordered suspension of Welsh's operating privileges for sixty days (J.A. 112-113).

D. OPINION OF THE WISCONSIN COURT OF APPEALS

Welsh appealed the order suspending his license to the Wisconsin Court of Appeals where he once again argued that the warrantless arrest was invalid.

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[4]Wisconsin law was amended effective July 1, 1978 to require the State to show that a person ordered to submit to a chemical test was lawfully arrested § 343.305(8)(b)(1)(a). Ch. 193 sec. 7, Laws of 1977. The hearing in this case was held under the 1975 laws.

Judge Gartzke applied a balancing test and ruled that the need to arrest was not so compelling as to justify an intrusion into the home. (J.A. 121-122) Because the trial court made no findings on consent, the Court remanded for findings on that issue. (J.A. 124-125)

E. OPINION OF THE WISCONSIN SUPREME COURT

The majority opinion of the Wisconsin Supreme Court rests on two prongs. First that Officer Daley had sufficient information to establish probable cause that Edward Welsh violated the traffic regulation forbidding driving while intoxicated. Second, that the immediate need for a blood alcohol test justified a pursuit and a warrantless nonconsensual entry to make an arrest. The majority determined

that the invasion was reasonable under the circumstances, 108 Wis. 2d at 328, 321 N.W.2d at 250 citing Brown v. Texas, 443 U.S. 47, 50-51 (1979). The Court rejected Welsh's argument that probable cause was lacking. The public interest favoring an entry to arrest was supported by the Wisconsin Supreme Court's citation of the pervasive problem posed by intoxicated drivers 108 Wis. 2d at 334, 321 N.W.2d 253, J.A. 157-159.

Exigent circumstances existed because of three factors: (1) the hot pursuit of the defendant 108 Wis. 2d at 336, 321 N.W.2d at 254, J.A. 161; (2) the imminent threat to public safety, id. at 336 (J.A. 164); and (3) the urgency involved in arresting the suspect in order to preserve evidence of a statutory violation. Id. at 338 (J.A. 165).

The Wisconsin Court, relying on Professor LaFave, stated that when officers are engaged in an investigation in the field there should be a presumption favoring a warrantless arrest, 2 LaFave, Search and Seizure, § 6.1 at 392.

The Wisconsin Supreme Court reversed the decision of the Court of Appeals and affirmed the Circuit Court's order suspending the petitioner's operating privileges.

The dissenting opinion (Abrahamson, J., and Heffernan, J. concurring) concluded that Welsh's arrest violated both Federal and State constitutional standards because: 1) the arrest was for a civil offense; 2) there were grave doubts as to the constitutionality of a warrantless intrusion into the home to arrest for such an offense not committed in the officer's presence; 3)

probable cause to arrest was lacking; and 4) exigent circumstances did not exist. 108 Wis. 2d at 339-358, 321 N.W.2d 255-264, J.A. 168-213).

Welsh petitioned for a Writ of Certiorari which was granted on February 22, 1983.

SUMMARY OF ARGUMENT

This case involves a warrantless nonconsensual, nighttime entry into the home of Edward Welsh by police who suspected him only of violating a law calling for a civil forfeiture and loss of driving privileges.[5]

The Wisconsin Supreme Court held

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[5]Evidence obtained from the entry and arrest, namely, testimony that Welsh was intoxicated, was used in the ensuing misdemeanor trial for driving while intoxicated. The misdemeanor conviction is now on appeal to the Wisconsin Court of Appeals and is stayed pending decision in this case.

that because the police had probable cause to arrest coupled with exigent circumstances, they had adequate grounds to enter the suspect's house to make an arrest for a traffic violation even though it was not committed in the officers' presence. This holding conflicts with the common law and is an unprecedented invasion of the privacy of the home.

This Court has repeatedly stated that home entries, without consent, and without a warrant are presumptively illegal. This entry, moreover, was at night to arrest for a minor offense. Such entries are per se illegal.

In justifying the warrantless nighttime intrusion into the home, the Wisconsin court placed heavy emphasis on the seriousness of the drunk-driving problem and the immediate need to preserve evidence of the accused's blood

alcohol content. In focusing on the seriousness of the drunk-driving problem the court in essence created an exception to the warrant requirement similar to the "murder scene exception" which this Court struck down in Mincey v. Arizona, 437 U.S. 385 (1978).

The court found exigent circumstances of hot pursuit, imminent threat to public safety, and urgency based upon the need to preserve the evidence. None of these circumstances were extant. The offense was a minor offense, as determined by the Wisconsin legislature, and it was committed outside the presence of the police thus precluding a finding of hot pursuit. The defendant was home in bed when the police arrested him thus making any "imminent threat to public safety" specious speculation. Finally, the urgent need to preserve evidence did

not exist because (1) the need to preserve evidence of a minor offense can never justify a warrantless nighttime entry into the home; (2) the defendant was outside the presence of the police for a sufficient time in which to destroy the evidence by continuing to drink; (3) if he did not continue to drink, there was ample time to get a warrant for his arrest.

The State failed to show that a warrant could not be obtained. Warrants might even have been obtained by the use of the telephone procedure allowed under the Federal Rules and not forbidden explicitly in Wisconsin.

While the entry was peaceful, the situation was instinct with coercion. No decision on whether consent justified the entry was made. This Court should reverse the Supreme Court of Wisconsin.

ARGUMENT

I. THE ULTIMATE PURPOSE OF THE FOURTH AMENDMENT IS TO PROTECT THE PRIVACY OF PERSONS IN THEIR HOMES

A. WARRANTLESS NON-CONSENSUAL HOME ENTRIES AT NIGHT ARE PRESUMPTIVELY ILLEGAL

Law places sharp limits on police entry into a home, whether to inspect, to search or to arrest. Without warrants such entries are presumptively unreasonable. United States v. Knotts, ___ U.S. ___, 103 S.Ct. 1081, 51 U.S.L.W. 4232, 4234, March 2, 1983; United States v. Johnson, ___ U.S. ___, 102 S. Ct. 2579, 2589 n.14, 73 L.Ed.2d 202, 216 n.14 (1982). Even if a right to enter exists, it is greater for felonies than for misdemeanors, and greater during the day than at night.[6] The majority of this Court

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[6]". . . it is difficult to imagine a more severe invasion of

in Payton v. New York, 445 U.S. 573 (1980) did not disagree with Justice White's summary of the common law.

> "At common law, absent exigent circumstances, entries to arrest could only be made for felony. Even in cases of felony, the officers were required to announce their presence, demand admission, and be refused entry before they were entitled to break doors. Further, it seems generally accepted that entries could be made only during daylight hours."

Payton v. New York, 445 U.S. at 616 (White, J., dissenting). With respect to minor offenses a comprehensive review of common law cases concluded that:

> "[S]ince neither an officer nor a citizen has authority to arrest for a past breach of the peace without a warrant, neither would have the right to break doors in an attempted arrest therefore, except for one committed in his presence and on fresh pursuit." (emphasis added)

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privacy than the nighttime intrusion into the private home that occurred in this instance." Jones v. United States, 357 U.S. 493, 498 (1958).

Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 803 (1924).

Except that the case before this Court involves a minor offense, its facts are strikingly close to those in Johnson v. United States, 333 U.S. 10 (1948), wherein this Court expressly failed to find any "exceptional circumstances" justifying relaxation of the warrant command. After receiving a tip from a known opium user that opium was being smoked in a hotel room, police went to the hall outside and at around 9:00 p.m. smelled the distinctive odor of opium emanating from the suspect's room. After knocking at the door the police entered without consent, and arrested the defendant. This Court noted that there might well have been sufficient probable cause to justify a warrant (333 U.S. at 13). However, the Court continued:

> "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

333 U.S. at 14. This Court rejected the argument that Johnson's arrest was necessary because of exceptional circumstances.[7]

The premise underlying discussion of the warrant requirement in the Johnson case is that the doctrine of exceptional circumstances must not be permitted to swallow the general rule

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[7]"No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction." 333 U.S. at 15.

which requires a neutral and impartial evaluation of the need for an instrusion into a home.

The Johnson decision explicitly confirms the need for a neutral and dispassionate evaluation.[8]

Following the rule of the Johnson case, this Court in McDonald v. United

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[8]"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing." 333 U.S. at 13-14.

States, 335 U.S. 451 (1948), once again declined to find exceptional circumstances in a case involving a warrantless entry to arrest for gambling operations. Police entered the defendant's room after peering through a transom and hearing the suspicious noise of an adding machine (characteristically used in those days in numbers operations). The Court confirmed the presumptive invalidity of warrantless entries, the value of obtaining a warrant, and the absence of an emergency.

> "This is not a case where the officers, passing by on the street, hear a shot and a cry for help and demand entrance in the name of the law."

335 U.S. at 454. The Court stressed the importance of magisterial intervention to protect Fourth Amendment

values.[9]

B. ENTRIES FOR MINOR OFFENSES REQUIRE WARRANTS

The Wisconsin Supreme Court stated that arrest authority rested only on its statute authorizing arrests for traffic regulations, Wis. Stat. 345.22 (A:2) 108 Wis. 2d at 326 n. 5, 321 N.W.2d at 249 n.5, J.A. 140).[10]

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[9]"The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law." 335 U.S. at 455-6.

[10]Wisconsin's criminal arrest statute, on which the Court did not rely, is 968.07 Wis. Stat. Traffic regulations are defined as penalized by forfeitures. 345.20(1)(a) Wis. Stat. (A-2). A few states authorize warrantless misdemeanors arrests although not committed in the presence of an offi-

Without discussion or citation of authority the Supreme Court of Wisconsin rejected the teachings of the common law,[11] and the wisdom of the ALI Model Code of Pre-Arraignment Procedure.[12]

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cer. See Appendix X, Model Code of Pre-Arraignment Procedure.

[11]Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 803 (1924). See Kurtz v. Moffitt, 115 U.S. 487, 498-9 (1885); Queen v. Mardsden (1868) L.R. 1 C.C.R. 131 holding that a recent assault on a constable did not justify a later home invasion to arrest.

[12]ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.1(1) (1975) provides:

(1) Authority to Arrest Without a Warrant. A law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed

(a) a felony;

(b) a misdemeanor, and the officer has reasonable cause to believe that such person

(i) will not be apprehended unless immediately arrested; or

(ii) may cause injury to himself or others or damage to property unless immediately

The dissenters recognized the civil nature of the offense, recognized it was not committed in the officer's presence, and said it could find no cases authorizing such a warrantless arrest. 108 Wis. 2d at 144, 321 N.W.2d at 258, J.A. 180. The dissent doubted that the defendant could have been arrested even outside his home, and doubted that such a prohibition would hamper effective law enforcement.

The question of the constitutionality of an arrest outside the home for this offense is not before this Court unless the Wisconsin statute authorizing the arrest is invalid on its face. Defendant argues that it is unconstitutional to interpret the Wisconsin traf-

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arrested;
or
(c) a misdemeanor or petty misdemeanor in the officer's presence.

fic arrest statute to allow a warrantless entry at night into the home for a minor offense.

This Court noted the existence of greater arrest powers in felonies and lesser for misdemeanors in Carroll v. United States, 267 U.S. 132 (1925), stating as the rationale:

> "The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace, while the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant."

267 U.S. at 157.

Justice Jackson, concurring in McDonald, called attention to the gravity of the underlying crime as a factor in evaluating warrantless home entries.

> "It is to me a shocking proposition that private homes, even quarters in a tenement, may be

> indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it."

335 U.S. at 459.

In United States v. Watson, 423 U.S. 411 (1976) and in Payton v. New York, 445 U.S. 573 (1980) this Court analyzed the history of the Fourth Amendment and the common law at the time of its enactment. In Watson the Court concluded that a warrantless arrest, on probable cause, in a public place for a felony was constitutional. In Payton, the Court addressed a question left open in Watson and concluded that a warrantless arrest, on probable cause, in the home for a felony was unconstitutional absent consent to enter or exigent circumstances. In those two cases, this Court drew a "firm line" for law enforcement officers, namely, the home.

> In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

445 U.S. at 590. For minor offenses, that line may not be crossed without a warrant.

Both Watson and Payton recognized that the common law rules of arrest had been carried into the Fourth Amendment guarantees against unreasonable searches and seizures, i.e. a warrantless arrest not permitted by the common law was constitutionally unreasonable.

Everyone in Watson agreed that the common law of arrest commanded that:

> a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest.

423 U.S. at 418 and 438.

At common law, a peace officer was not permitted to arrest without a warrant for misdemeanors not committed in his presence. Even if the misdemeanor was committed in his presence the officer was only allowed to make a warrantless arrest if it was a breach of the peace and he gave immediate and continuous pursuit.

The common law's focus on the severity of the crime, felony or misdemeanor, gave rise to the exigent circumstances doctrine. For a misdemeanor the only exigent circumstance justifing a warrantless arrest was severity rising to the level of a breach of the peace and committed in the presence of an officer who gave immediate and continuous pursuit. Absent these conditions, there appears to have been no such thing as an exigent circumstance

justifying a warrantless arrest for a misdemeanor.

The common law rule is sound, especially as it applies to warrantless nonconsensual entries into the home. It preserves the sanctity of the home by requiring that a neutral magistrate make the probable cause determination before a home entry.[13]

II. THE WISCONSIN SUPREME COURT INVITES EGREGIOUS VIOLATIONS OF THE PRIVACY OF THE HOME

The Wisconsin Supreme Court claimed support for its balancing of public and individual interests from language in

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[13]This rule guards against after-the-event hindsight justifications of warrantless entries. It also precludes the evidentiary problems inherent in determining what information was actually available to the officer. The record in this case reveals that it was fraught with such hindsight and evidentiary problems. The common law foreclosed such problems for misdemeanors.

Brown v. Texas, 443 U.S. 47, 50-51 (1979).

> "Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."

108 Wis. 2d at 328, 321 N.W. 2d at 250, J.A. 145. The citation is inapposite because the seizure evaluated in Brown was an investigatory stop, not an arrest or a home entry. Moreover, the invasion condemned in Brown, even after balancing was far less intrusive than that countenanced here by the Supreme Court of Wisconsin.

The Wisconsin Supreme Court also was troubled by the pervasive problem of drunken driving, citing statistics revealing the number of highway deaths. The Court did not explain why the drunken driving problem generally

was relevant to the problem of probable cause specifically. Presumably the Court meant that the public interest in catching culprits justifies a relaxed doctrine of probable cause where intoxication is suspected. This is flawed reasoning.

This Court rejected a similar justification for an equal protection violation. In Craig v. Boren, 429 U.S. 190 (1976), this Court held that despite statistical evidence that more males than females drove while drunk, it did not justify a gender-based discrimination against males which offended the Fourteenth Amendment.

This Court has recognized the seriousness of driving while intoxicated, and recently held that a state might constitutionally use as evidence the fact that a culprit has refused to take a breathalyzer test, South Dakota v.

Neville, ___ U.S. ___, 103 S.Ct. 916, 51 U.S.L.W. 4148 (Feb. 22, 1983). In Neville and in the cases upon which it relied, Schmerber v. California, 384 U.S. 757 (1966), the defendants were in lawful police custody when the alcohol blood tests were demanded. The Neville decision, moreover, notes that there might be due process problems if the "police initiated physical violence while administering the test. . . ." 103 S.Ct. at 921 n.9. Thus this Court in both Craig and Neville has recognized the principle that the Constitution places limits in the battle against suspected drunk drivers.

By its emphasis on the nature of the offense, the Wisconsin Supreme Court creates a "blood alcohol test" exception to the warrant requirement, much like the "murder scene" exception which the Court rejected in Mincey v.

Arizona, 437 U.S. 385 (1976).

The drunken driving problem, however serious, was not regarded as so serious by Wisconsin's legislature as to make a first offender guilty of anything other than a civil violation. Subsequent violations are only misdemeanors. The Wisconsin legislature did not direct nonconsensual home entries to test for intoxication.[14] It was the Wisconsin Supreme Court which did, thus diluting the importance of its own recent decision in Laasch v. State, 84 Wis. 2d 578, 267 N.W.2d 278 (1978), in which it recognized that because "one's

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[14]For a suggestion that legislation might authorize a home entry see State v. Boggess, 110 Wis. 2d 309, 328 N.W.2d 878 (Wis. Ct. App. 1982), upholding a warrantless, but peaceful home entry by the sheriff not to arrest but to investigate a serious report of child abuse. The Court relied upon 48.981 Wis. Stat. and the aid-to-life exception to the warrant requirement.

home is entitled to special dignity and sanctity" an invalid arrest deprives the courts of jurisdiction. 84 Wis. 2d at 594, 267 N.W.2d at 282.

The opinion of the Wisconsin Supreme Court, despite the flaws revealed in the dissenting opinion of Justice Abrahamson, creates an exception to the warrant requirement based upon alleged drunk driving.

III.A. THE WARRANTLESS NONCONSENSUAL NIGHTTIME ARREST IN THIS CASE CANNOT BE VALID UNDER THE EXIGENT CIRCUMSTANCES DOCTRINE.

Exceptions to the warrant requirement arise in two different situations. First, in criminal cases where the public policy favoring warrants must sometimes defer to the compelling need for immediate action by police. Such needs arise to protect against the loss of evidence in major criminal

cases or to protect the public from immediate hazards. Second, in civil cases where a governmentally approved scheme would indisputably fail if warrants were required.[15]

In Payton v. New York, 445 U.S. 573 (1980) this Court recognized that in some emergency situations, a doctrine of exigency excuses the warrant requirement.[16] In Payton, the Court

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[15]Donovan v. Dewey, 452 U.S. 594 (1981); Michigan v. Tyler, 436 U.S. 499, 510 (1978); Camara v. Municipal Court, 387 U.S. 523 (1967) and cases cited at 387 U.S. at 539. Cf. Michigan v. Clifford, cert. granted #82-357, 51 U.S.L.W. 3545 (January 24, 1983). See also United States v. Kaiyo Maru No. 53, 699 F.2d 989, 995 (9th Cir. 1983), upholding a warrantless arrest of a foreign fishing vessel.

[16]Useful reviews of the doctrine are Groot, Arrests in Private Dwellings, 67 Va. L. Rev. 275 (1981); Donnino & Girese, "Exigent Circumstances for a Warrantless Home Arrest," 45 Albany L. Rev. 90 (1980); Harbaugh & Faust, "Knock on Any Door" - Home Arrests after Payton and Steagald, 86

expressly left open the question as to the type of emergency situation which would justify a warrantless nonconsensual entry into the home.

> Accordingly, we have no occasion to consider the sort of emergency or dangerous situation described in our cases as "exigent circumstances," that would justify a warrantless entry into a home for the purpose of either arrest or search.

Id. at 583.

To find that police can make war-

Dickinson L. Rev. 191 (1982); Larkin, Exigent Circumstances for Warrantless Home Arrests," 23 Ariz. L. Rev. 1171 (1981); Note, Warrantless Entry to Arrest: A Practical Solution to a Fourth Amendment Problem, 1978 U. Ill. L.F. 655; Mascolo, The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment, 22 Buffalo L. Rev. 419 (1972); Rotenberg & Tanzer, Searching for the Person to be Seized, 35 Ohio St. L. J. 56 (1974); Note, The Neglected Fourth Amendment Problem in Arrest Entries, 23 Stan. L. Rev. 995 (1971). Note, Warrantless Arrests, Justification by Exigent Circumstances, 6 Hamline L. Rev. 191 (1983).

rantless nonconsensual entries into a home because of exigent circumstances requires two conclusions: 1) that the privacy interests of everyone in the home (not just the suspect's) are subordinate to the interests of government in law enforcement[17] and; 2) that the

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[17]Commentators urge that an arrest warrant based on a misdemeanor "may be constitutionally inadequate to authorize police entry into the suspect's home." Groot, Arrests in Private Dwellings, 67 Va. L. Rev. 275, 280 n.25 (1981); Evans, Constitutional Restraints on Residential Warrantless Arrest Entries, 10 Am. J. Crim. L. 1 (1982). An arrest warrant should not ordinarily authorize a forced entry into a home because the privacy interests of those sharing the suspects home are invaded. The 9th Circuit recently held that an arrest warrant alone did not justify entry into a home in a felony case, United States v. Underwood, 693 F.2d 1306 (9th Cir. 1982).

> "An arrest warrant does not involve a judicial determination that there is probable cause to believe that the suspect may be found within a specified private dwelling - a determination that would justify an otherwise prohibited entry."

693 F.2d at 1311. Contrary to

Fourth Amendment's reasonableness standard permits the invasion without neutral and detached magisterial evaluation. The State bears the burden of proving both conclusions.[18]

In the much cited case of Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (en banc), the court suggested seven factors that should be considered before concluding that a home entry is exigent: (1) Whether or not a grave offense is involved; (2) whether the suspect is reasonably believed to be armed; (3) whether the evidence is clear that the suspect committed the crime; (4) whether there is a strong reason to believe the suspect is pre-

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Underwood is United States v. Spencer, 684 F.2d 220 (2nd Cir. 1982).

[18]McDonald v. United States, 335 U.S. 451, 456 (1948); Vale v. Louisiana, 399 U.S. 30 (1976).

sent in the home; (5) whether the suspect might escape; (6) whether the entry is made peaceably; and (7) whether the entry is made in daylight or at night.

The seven factor test is complex and it requires police to make "on the spot decisions by a complicated weighing and balancing of a multitude of imprecise factors." 2 LaFave, Search and Seizure §6.1 at 390.[19]

Another approach to evaluating whether an exigency exists is to apply a comprehensive definition, as exemplified in People v. Ramey, 16 Cal. 3d 263, 545 P.2d 1333 (1976), cert. denied, 429 U.S. 929 (1976). Exigency

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[19]The Dorman test is currently applied in the District of Colombia, United States v. Glover, 555 F. Supp. 604, 612 (D. D.C. 1982), and in Minnesota, State v. Hatcher, 322 N.W.2d 210 (Minn. 1982).

is defined as

> "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence."

545 P.2d at 1341. The Ramey definition has the merit of apparent simplicity and flexibility.[20]

Some Courts have avoided the categorical factor approach of Dorman and the definitional approach of Ramey and have adopted a case-by-case "holistic" test.[21] This is an open-ended test allowing courts to focus on whatever facts they wish to justify a warrant-

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[20]See discussion in Donnino and Girese, Exigent Circumstances for a Warrantless Home Arrest, 45 Albany L. Rev. 90 at 106-109 (1980).

[21]So described and cases cited in Donnino and Girese, supra at 109-110. See United States v. Flickinger 573 F.2d 1349 (9th Cir. 1978) cert. denied, 439 U.S. 836 (1978).

less entry. Nevertheless it includes evaluation of whether there was time to secure a warrant.

Professor LaFave suggests a presumption in favor of a warrantless entry and arrest in an ongoing investigation because "the probabilities are high that it is not feasible for the police to delay the arrest while one of their number leaves the area, finds a magistrate and obtains a warrant. . . ." 2 LaFave, supra at 392. The Wisconsin Supreme Court adopted that presumption.[22]

The Wisconsin Supreme Court's presumption must be rejected because it would swallow the general rule against warrantless nonconsensual entries. The

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[22]108 Wis. 2d at 338, 321 N.W.2d at 255, J.A. 166-168 but see State v. Pires, 55 Wis. 2d 597, 201 N.W.2d 153 (1972).

Supreme Court of California cautions that

> "the exception must not be permitted to swallow the rule: in the absence of a showing of true necessity - that is imminent and substantial threat to life, health or property - the constitutionally guaranteed right to privacy must prevail."

People v. Smith, 7 Cal.3d 282, 286, 496 P.2d 1261, 1263 (1972).[23]

B. THERE CAN BE NO CIRCUMSTANCES JUSTIFYING ENTRY INTO THE HOME TO TAKE A BLOOD ALCOHOL TEST

The Wisconsin Supreme Court also justified Daley's entry because "without an immediate test, highly reliable

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[23]In accord: ALI, Model Code of Pre-Arraignment Procedure, § 260.5, Emergency Searches (1975):

> An officer who has reasonable cause to believe that premises . . . contain (1) individuals in imminent danger of death or seriously bodily harm . . . may, without a search warrant, enter and search . . . to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction.

and persuasive evidence . . . would be destroyed." 108 Wis. 2d at 338, 321 N.W.2d at 255, J.A. 166. That is not necessarily so for three reasons. First it is not certain a suspect will consent to a test. Second, even the Wisconsin Supreme Court recognized that the suspect may well continue to drink[24] "thereby rendering the result of a blood test meaningless" 108 Wis. 2d at 333, 321 N.W.2d at 253 (J.A. 155-6). Thus, the Wisconsin Supreme Court destroys a reason it advanced to justify entry. Third, there was ample time to secure a warrant.[25]

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[24]Welsh testified that he consumed about half a pint of Canadian Club after arriving home (J.A. 99).

[25]The concentration of alcohol in blood reaches its peak at some time after drinking ceases, perhaps as much as a half hour later. The rate at which alcohol is absorbed into the blood varies in each subject, depending

When Welsh was arrested, in April 1978, Wisconsin law allowed the results of a blood alcohol test for intoxication to be admitted as evidence without expert testimony if taken within two hours after the event to be proved. § 885.235(1) Wis. Stat. 1977 (A-6). After that two hour period, such a test could be admitted as evidence if "expert testimony establishes its probative value" 885.235(3).[26]

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on many factors, including: the nature of the drink, the amount and kind of food already in the stomach, the size, weight and condition of the subject, and his physiological and emotional condition at the time. Hence, complete absorption may require 2 to 6 hours or more. Goodman and Gilman's The Pharmacological Basis of Therapeutics 382 (6th ed. 1980).

[26]Wisconsin law now provides for admissibility within three hours without expert testimony, and after that time with expert testimony on the probative value of the test. Chapter 184, § 5, Laws of 1981, amending 885.235. On the same day as the Welsh decision

Further, a person can be detained for up to four hours. § 345.24 Wis. Stat. (A-2). Indeed the Supreme Court of Wisconsin observed:

> "Presumably, this four-hour statutory limitation sought to provide an adequate time allowance for the arrested intoxicant's blood alcohol content to metabolize to a safer level. . . ."

108 Wis. 2d at 327, 321 N.W.2d at 255 (J.A. 164)

The Supreme Court of Wisconsin relied upon the observation in State v. Bentley, 92 Wis. 2d 860, 864, 286 N.W.2d 153 (Wis. Ct. App. 1979), that an exigency is created because "blood

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the Wisconsin Supreme Court held admissable a blood test taken under the law applicable to Welsh over two hours after the event. State v. Peotter, 108 Wis. 2d 359, 321 N.W.2d 265 (1982), where the defendant did not adequately object to admission. The delayed test nevertheless had probative value.

rapidly metabolizes alcohol."[27] Yet in Bentley, the blood test was taken three and a half hours after an accident causing injuries and death to others! The Bentley court observed only that "the officers believed they did not have sufficient time to obtain a warrant from a magistrate." 92 Wis. 2d at 865, 286 N.W.2d at 155. What may be a reasonable belief on magisterial availability in Eau Claire where the Bentley case occurred is not necessarily true in Madison, Wisconsin's capital. Moreover, alcohol metabolizes at

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[27]The observation is false. Alcohol, absorbed from the stomach, is carried in the blood until it is metabolized in the liver and in other tissues, and it is not rapidly metabolized. See footnote 25 above and text.

Furthermore in Bentley as in Schmerber the defendants were in a hospital about to undergo medical treatment which might have destroyed the value of blood-alcohol tests.

the same rate in both cities.

The State has at no time offered any evidence that a warrant could not have been obtained in Madison, Wisconsin between the hours of 9:00 p.m. and midnight - within three and a half-hours after the suspected intoxication occurred, the period in which a valid blood test was obtained in the Bentley case.

C. THE ARREST OF WELSH WAS NOT TRIGGERED BY A DANGER TO HEALTH OR PUBLIC SAFETY

Edward Welsh, home in bed, threatened no one. Officer Daley's entry into the home was not to give first aid or assistance. The Wisconsin Supreme Court, however, without citing any evidence in the record, suggests that Welsh might return to his car and hence be a danger to himself and others. 108 Wis. 2d at 337, 321 N.W.2d at 255, J.A.

165).

Edward Welsh abandoned his car some distance from home where it was stuck. There is no evidence whatsoever that Edward Welsh would have gone back and started driving again. As Justice Abrahamson observed in dissent:

> "The contribution to highway safety of allowing warrantless arrests in the home of persons who are reported to have driven erratically and who are described as drunk or sick and who caused no damage to property or person is marginal at best."

108 Wis. 2d at 351-2; 321 N.W.2d at 261, J.A. 197-8. Indeed, it is ludicrous to drag a person from his bed to take him to a police station for a breathalyzer test and then by statute be compelled to hold him for 4 hours to protect the public.

Occasions may arise in which an interest in saving life should prevail over the interest in preserving the

sanctity of the home. This is not that occasion.[28]

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[28]Mincey v. Arizona, 437 U.S. 385, 392-3 (1978). People v. Mitchell, 39 N.Y.2d 173, 347 N.E.2d 607 (1976), cert. denied 426 U.S. 953 (1976). In State v. Kraimer, 99 Wis. 2d 306, 298 N.W.2d 568 (1980) the Wisconsin Supreme Court approved the emergency entry doctrine advanced in Mascolo, The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment, 22 Buff. L. Rev. 419, 426 (1973) stating

> "Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search."

99 Wis. 2d at 306, 298 N.W.2d 572.

D. THE DOCTRINE OF "HOT PURSUIT" DOES NOT JUSTIFY A WARRANTLESS ENTRY

Without citation the Wisconsin Supreme Court relied on the "hot pursuit" doctrine. 108 Wis. 2d at 336, 321 N.W.2d at 254, J.A. 161. That court failed to explain the nature of the doctrine.

The roots of the doctrine are evidently justified by practicality. When an officer sees a fleeing felon, or one who has breached the peace in the officer's presence, it is rational to expect the officer to pursue, and perhaps even follow into the home where the escaping culprit takes refuge. Fundamental to the concept is a chase -- an immediate and uninterrupted pursuit of a felon, or at least of a major peace-breaker.[29]

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[29] Johnson v. United States, 333

Warden v. Hayden, 387 U.S. 294 (1967), which has been frequently referred to as a hot pursuit case (perhaps because of Mr. Justice Fortas' concurring opinion), was in reality not a hot pursuit case. An armed robbery was committed outside the presence of the police. It was a cab driver who saw the incident and pursued the suspect to a house. Police received the information and arrived at the house within five minutes. Upon their arrival at the house, the police knocked at the door and arguably were given per-

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U.S. 10, 16 n.7 (1948) appears to be the first place that the term "hot pursuit" was used by this Court. It is, however, a term used in international law to describe the right to pursue and capture foreign vessels on the high seas for prior offenses within territorial waters, see "The I'm Alone," (Canada v. United States), 2 Hackworth, International Law 703 (1941); The Newton Bay, 36 F.2d 729, 731 (2nd Cir. 1929, Manton J.).

mission to enter the house to search for the suspect.

This Court, in deciding that the entry without a warrant was valid, appears to have rested its decision upon all the factors which made immediate entry imperative.

> The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

387 U.S. at 298-99. Hence, the Court in Hayden rested its decision upon the exigency of the circumstances created by the gravity of the offense and the presence of firearms. This was recognized in United States v. Santana, 427 U.S. 38, 43 n.3 (1976) which is the

only true hot pursuit case decided by this Court.

In Santana, the Court recognized that some element of a chase will usually be involved in a "hot pursuit case." The defendant was first observed and sought for arrest by police in a public place where she had no expectation of privacy. Her retreat into the vestibule of her home did not prevent her lawful arrest because of the hot pursuit. The Court concluded,

> that a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under Watson, by the expedient of escaping to a private place.[30]

427 U.S. at 43.

This Court says that "hot pursuit" involves (1) the observance and at-

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[30]Citing United States v. Watson, 423 U.S. 411 (1976).

tempted arrest by the police of a suspected felon in a public place and (2) flight by that suspect followed by immediate and continuous pursuit of the suspect. The apprehension and arrest without a warrant may then occur in a private place.

No true hot pursuit exists in this case. Officer Daley was doubtless looking for Welsh, but Welsh was at home, not in a public place as in Santana. Nor was the suspect a felon, which would have made an attempted arrest of him in a public place valid under Watson.

A case closer to the present one is State v. Penas, 200 Neb. 387, 263 N.W.2d 835 (1978), where the majority stated the facts to fit this Santana concept of hot pursuit. The strong dissent in that case, however, points out that the facts may have actually

been quite different from those stated by the majority and indicates the possible abuse by the police and courts of even this sort of "hot pursuit" definition.

E. EXIGENCIES RECOGNIZED BY LOWER COURTS ARE NOT REMOTELY CLOSE TO THE FACTS IN THE WELSH CASE.

Lower courts have found exigent circumstances in settings entirely different from this case. Warrantless entries have been allowed in felony cases where:

1) accomplices of a serious drug offender might suddenly appear to take away evidence;[31]

2) suspects might be warned and could escape, and where surveillance

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[31] United States v. Kulcsar, 586 F.2d 1283 (8th Cir. 1978); see also United States v. Mapp, 476 F.2d 67 (2nd Cir. 1973).

might have alerted the suspects;[32]

3) extrinsic evidence, such as drugs held by the suspects, could be quickly and easily destroyed;[33]

4) waiting while keeping the suspects place of hiding under surveillance would have been the equivalent of "laying a public siege;"[34]

5) a serious and reasonable belief that an ongoing national conspiracy to

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[32]United States v. Campbell, 581 F.2d 22 (2nd Cir. 1978); see also United States v. Williams, ___ F.2d ___ (6th Cir. 1982), pet. for cert. filed, #82-1442, 51 U.S.L.W. 3707.

[33]United States v. Vasquez, 638 F.2d 507 (2d Cir. 1980), cert. denied, 454 U.S. 975 (1981) (Brennan, J., White, J., Marshall, J., dissenting); United States v. Flickinger, 573 F.2d 1349 (9th Cir. 1978), cert. denied, 439 U.S. 836 (1978); State v. Nagel, 308 N.W.2d 539, 541-44 (N. 1981); State v. Decker, 119 Ariz. 195, 580 P.2d 333 (1978).

[34]United States v. Bustamante-Gamez, 488 F.3d 4, 9 (9th Cir. 1973).

assassinate public figures exists and should be thwarted.[35]

Edward Welsh's case does not fall within any of these.

IV. TELEPHONIC WARRANTS SUPPLY AN ALTERNATIVE TO A WARRANTLESS ENTRY

The Supreme Court of Wisconsin found that Officer Daley had probable cause to arrest Welsh for driving while intoxicated, that is a warrant could have been issued. Although the laws of Wisconsin do not specifically provide for warrants to be obtained by telephone, as do the Federal Rules of Criminal Procedure 41(c)(2), an old Wisconsin Supreme Court opinion suggests their propriety even without

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[35]See People v. Sirhan, 7 Cal.3d 369, 497 P.2d 1121 (1972).

specific legislation.[36] Counsel's investigations have not disclosed any decisions forbidding telephonic warrants in Wisconsin. Bills to specifically authorize search warrants to be issued following a telephone procedure were introduced in the Wisconsin legislature in 1982 and reintroduced in 1983.[37]

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[36]Glodowski v. State, 196 Wis. 265, 270-2, 220 N.W. 227, 229-30 (1928). Several states have approved such warrants, State v. Andries, 297 N.W.2d 124.125 (Minn. 1980); State v. Parisi, 177 N.J. Super. 451, 426 A.2d 1081 (1980), rev. on other grounds 436 A.2d 948 (N.J. Super. Ct. App. Div. 1981); State v. McMurphy, 48 Or. App. 327, 616 P.2d 1203, 1206 (Or. Ct. App. 1980). Telephone warrants are allowed by statute in Arizona and California. Ariz. Rev. Stat. Ann., sec. 13-3914(c) (1982); Cal. Pen. Code secs. 1526(b) and 1528(b) (West Supp. 1981).

[37]Wis. S. Bill 37 (1983) introduced Jan. 25, 1983. It is supported by the Attorney General of Wisconsin, The Wisconsin Chiefs of Police Association and by Wisconsin Sheriffs. Hear-

The 10th Circuit recently directed that when a trial court hears a claim that exigent circumstances justify a warrantless home entry, the availability of a telephonic warrant under Rule 41(c)2 should be considered. United States v. Cuaron, 32 Crim. L. Rep. 2493, March 16, 1983. This Court should confirm that wisdom and direct that the availability of a telephone warrant, or a normal arrest warrant, be considered when a nonconsensual home entry is sought.[38]

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ings on this bill were held on March 10, 1983.

[38]See Comment, Oral Search Warrants: A New Standard of Warrant Availability, 21 U.C.L.A. L. Rev. 691 (1973).

V. A DECISION INVALIDATING THE ENTRY INTO THE WELSH HOME WOULD NOT HAMPER EFFECTIVE LAW ENFORCEMENT

Justices of this Court have frequently urged that it construct rules that foster rather than hinder effective law enforcement practices. United States v. Ross, 457 U.S. ___, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572, 594-5 (1982) (Blackmun, J., concurring); Payton v. New York, 445 U.S. 573, 618 (1980) (White, J. dissenting); United States v. Watson, 423 U.S. 411, 431 (1976) (Powell, J. concurring); Gerstein v. Pugh, 420 U.S. 103, 113 (1975).

A decision favoring Welsh could supply a useful "bright line" rule: namely, that police must never, without a warrant, enter a home to arrest a suspect whose only offense is minor. This would provide useful guidance to the police which they can understand.

CONCLUSION

The Welsh case is not a situation where entry was necessary to preserve evidence or life. Nor was it a situation where the suspect might escape.

This is a case in which a man, at night, naked in his bed in his family home, was arrested and forced to dress and leave the protection of his family. He was hustled to a police station for an offense which, so far as the police then knew, was punishable only by a forfeiture and the loss of driving privileges. Without consent the entry and arrest were unconscionable. This was an unreasonable seizure forbidden by the Fourth and Fourteenth Amendments to the Constitution.

This Court should reverse the Supreme Court of Wisconsin and remand for a determination of whether the of-

ficer's entrance was consensual.

Respectfully Submitted

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APPENDIX TO PETITIONER'S BRIEF

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

WISCONSIN STATUTES 1975*

"345.20 Wis. Stat. 1975
General provisions in traffic

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*Some amendments to Wisconsin OMVWI Law in 1977 were effective immediately. Others were effective in 1978 after the events in the Welsh case.

forfeiture actions.
(1) Definitions. In ss. 345.20 to 345.53: (a) "Traffic regulation" means a provision of chs. 341 to 349 for which the penalty for violation is a forfeiture, or an ordinance enacted in accordance with s. 349.06."

"345.22 Wis. Stat. 1975 Authority to arrest without a warrant. A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation.

345.24 Wis. Stat. 1975 Officer's action after arrest for driving under influence of intoxicant. A person arrested under s. 346.63 or an ordinance lawfully enacted in conformity therewith for operating a motor vehicle while under the influence of an intoxicant may not be released until 4 hours have elapsed from the time of his arrest or unless a chemical test administered under s. 343.305 shows that there is .05% or less by weight of alcohol in such person's blood, but such person may be released to his attorney, spouse, relative or other responsible adult at any time after arrest.

"346.63 Wis. Stat. 1975 Operating under influence of

intoxicant. (1) It is unlawful for any of the following to drive or operate a motor vehicle (a) a Person who is under the influence of an intoxicant or a controlled substance."

WISCONSIN STATUTES 1975

"346.65 Wis. Stat. 1975 Penalty for violating sections 346.62 to 346.64. . . . .(2) Any person violating s. 346.63 (1) may be required to forfeit not more than $200 for the first offense and, upon the 2nd or subsequent conviction within 5 years, shall be imprisoned not less than 5 days nor more than one year and in addition may be fined not more than $500."

"343.305 Wis. Stat. Suspension of license on refusal to submit to chemical tests for intoxication. (1) Any person who drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61 shall be deemed to have given consent to a chemical test of his breath, blood or urine, for the purpose of determining the alcoholic content of his blood if arrested and issued a citation for driving or operating a motor vehicle while under the influence of an intoxicant in violation of s. 346.63 (1) (a) or a local ordinance which is in conformity there-

with. The test shall be administered upon the request of a traffic officer.

* * *

(2) (a) If a person is arrested and issued a citation for driving or operating a motor vehicle while under the influence of an intoxicant the arresting officer shall inform him:

1. That he is deemed to have consented to a chemical test under sub. (1);

2. That if he refuses to submit to the test he shall have his driving privilege suspended for a period of 60 days as provided in sub. (7);

* * *

2. (b) If the person refuses the request of a traffic officer to submit to a chemical test, no test shall be given, but the traffic officer shall prepare a written report of the refusal and have it delivered within 5 days to a court of record in the county in which the person resides or in the county in which the arrest was made. He shall promptly deliver a copy to the person requested to take such test. The report shall contain the following information:

1. That the person at the time he was requested to submit to a test was under arrest for driving or operating a motor vehicle while under the influence of an intoxicant.

2. That the person refused to submit to a test;

3. That such person was in-

formed of the consequences of his refusal to submit to the test; and

4. That such person was informed of his rights under subs. (4) and (5)(a).

5. That the refusal of the person to submit to a test was unreasonable."

* * *

(7) (c) If the reported person requests a hearing within the 60 days, the court shall set a time and place for the hearing, with notice to the person. Requests for hearing as herein provided shall go to the head of the docket wherein filed. The hearing shall be transcribed and shall be limited to the issues stated in sub. (2) (b). Nothing in this subsection shall prohibit the person from introducing evidence on his own behalf to establish the reasonableness of his refusal to submit to a chemical test provided under s. 343.305(1). At the close of the hearing or within 10 days thereafter, the court shall determine whether or not the conditions of sub. (2) (b) have been complied with. If the conditions of sub. (2) (b) have been complied with, the court shall direct the administrator to suspend the operating privilege of such person for 60 days. If the conditions of sub. (2) (b) have not been complied with, the court shall order that the report be dismissed and that no action be taken on the driving privilege.

Nothing in this subsection shall preclude the prosecution for violation of s. 346.63 (1) (a) or a local ordinance which is in conformity therewith."

WISCONSIN STATUTES 1977

885.235 Chemical tests for intoxication. (1) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant when operating or driving a motor vehicle, or while handling a firearm, evidence of the amount of alcohol in such person's blood at the time in question as shown by chemical analysis of a sample of his breath, blood or urine is admissible on the issue of whether he was under the influence of an intoxicant if such sample was taken within 2 hours after the event to be proved.

* * *

(3) If the sample of breath, blood or urine was not taken within 2 hours after the event to be proved, evidence of the amount of alcohol in the person's blood as shown by the chemical analysis is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if such effect is established by expert testimony.